



October 12, 2004

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Federal Communications Commission  
Office of Secretary

Marlene S. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D. C. 20554

Re: 900 MHz Freeze  
WT Docket No. 02-55

Dear Ms. Dortch:

By Public Notice DA 04-3013, the Commission recently imposed a freeze on the filing of 900 MHz applications. For the reasons set forth below, the National Association of Manufacturers and MRFAC, Inc. ("NAM/MRFAC") urge the Commission to reconsider this action and promptly take steps to reopen the 900 MHz band for legitimate applications.

According to the Public Notice, the Commission adopted the freeze due to an unusual surge in the filing of 900 MHz applications since release of the 800 MHz Report and Order, FCC 04-168, August 6, 2004. The Public Notice expressed concern that, absent a freeze, "additional such filings may compromise Nextel's ability to obtain the necessary 'green space' to house some of its systems while the 800 MHz band is reconfigured. . . .Ibid.

NAM/MRFAC appreciate the Commission's concern. However, the vast majority of 900 MHz applications filed since release of the Report and Order are those of Nextel itself via its wholly-owned subsidiary, ACI 900, Inc. As others have observed, Nextel has filed hundreds of applications requesting thousands of frequencies -- filings which appear to contravene long-established Commission Rules for eligibility and loading without any request, much less demonstration of grounds, for a waiver.<sup>1</sup>

Nonetheless, the NAM/MRFAC concern is not primarily with Nextel's applications as much as it is with the inability of their constituents and customers to file 900 MHz applications.

<sup>1</sup> See, e.g., Informal Petition to Deny of Saia Communications, Inc. filed September 15, 2004 in re File Nos. 0001840273 et al; Informal Opposition of Verizon Wireless, filed September 14, 2004 in re File Nos. 0001845839 et al.; United Telecom Council letter to Michael Wilhelm, Chief, Public Safety and Critical Infrastructure Division dated September 23, 2004.

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Industrial users require access to this spectrum (800 MHz channels having been depleted in most areas) in order to satisfy important productivity and plant safety requirements. These are legitimate applications filed for legitimate purposes.

Whatever disposition the Commission chooses to make of the ACI applications, it is unfair to penalize legitimate industrial users based on concerns that unscrupulous operators might seek to file applications solely for the purpose of requiring Nextel to buy them out.

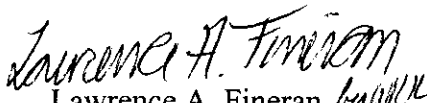
The Commission has it within its authority to request proper demonstration at the application stage of a licensee's eligibility and proposed loading. Moreover, if desired, the Commission could ramp up its post-grant audit program by way of follow-up construction letters to ensure that systems are timely loaded and constructed. Thus, actions short of a total freeze, while perhaps more resource-intensive, are available which could better balance the Commission's concerns in adopting the freeze with the needs of innocent third parties in securing access to needed spectrum.


One additional point. In the 800 MHz Order the Commission liberalized its Rules so as to allow assignment or modification of existing non-SMR licenses to allow SMR uses. Id. at ¶ 337. The Commission did not change its eligibility and loading standards for review of initial applications for new licenses. To allow Nextel to file applications raising substantial questions of compliance with the Rules, while shutting the door in the face of those who would file applications compliant with the Rules, is unreasonable. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (Commission may not treat parties similarly situated in dissimilar fashion absent cogent explanation).

Accordingly, in light of the above, the NAM and MRFAC urge the Commission to promptly lift the freeze and allow the filing of applications by business and industrial users.<sup>2</sup>

An original and one copy of this filing are submitted for inclusion in the Docket.

Sincerely,

  
Lawrence A. Fineran  
Vice-President  
Regulation and Competition

  
Marvin W. McKinley  
President

cc: Michael Wilhelm  
Robin Cohen, ACI 900, Inc.

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<sup>2</sup> If, despite the foregoing, the Commission were to determine not to lift the freeze, at a minimum it should liberally grant waivers based on showings of proper eligibility/loading.